IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Tax Mach Company Vs. Kamal Kishore
1.S.B. CR. REVISION PETITION NO.893/2006

Tax Mach Company Vs. Kamal Kishore.
2.S.B. CR. REVISION PETITION NO.894/2006
Against order dated 05.07.2006 passed by learned Judicial Magistrate No.3, FirstClass, Bhilwara in Complaint No.115/2004.

Date of Order :: 13th November, 2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Dr. Sachin Acharya for petitioner.

BY THE COURT:

These two revision petitions have been filed against common order dated 05.07.2006 by one and same petitioner against the same complainant, therefore, they are being disposed of by this common order.

By the present revision petitions challenge has been made to the order dated 05.07.2006 passed by learned Judicial Magistrate No.3, First Class, Bhilwara in Complaint Nos.110/2004 and 115/2004, where by the learned trial court has rejected the applications moved on behalf of the petitioner under Section 311 Cr.P.C.

The facts of the case are that in the complaints under Section 138 of the Negotiable Instruments Act, 1938 (hereinafter to be referred to as `the N.I. Act') which were registered as complaints No.110/04 and 115/04 before the learned trial court, Bhilwara, the allegations were to the effect that cheques bearing Nos.102757 dated 10.04.2003 and 102754 dated 05.04.2003 of Rs.20,000/- and Rs.30,000/- respectively of Bhilwara Mahila Urban Co-operative Bank Limited, Bhilwara (hereinafter to be referred as 'the Co-operative Bank') were dishonoured, therefore, the registered notices were served.

The learned trial court recorded the statement of complainant-non petitioner Kamal Kishore Toshniwal and the matters were kept for recording the statement under Section 313 Cr.P.C .It appears that at that stage, an application under Section 311 Cr.P.C. was moved for recalling PW1 so that witness who had already been examined could be cross-examined. Learned trial court after considering the matter and hearing parties on the application moved under Section 311 Cr.P.C. rejected the same vide order dated 05.07.2005. Hence, the present revision petitions.

The contention of learned counsel is that since after the statement of the PW1, before recording of statement under Section 313 Cr.P.C., the application was moved, therefore, it was well within time and the trial court has committed grave illegality in rejecting the applications. It has also been submitted that for the correct decision in the case in the interest of justice, it was essential for the learned trial court to have recalled the witness. He submits that learned trial court has failed to have exercised jurisdiction

vested in it in judicious way, therefore, the order passed; by the learned trial court suffers from serious infirmity. Learned counsel in support of its case has placed reliance on the case of Rajendra Prasad Vs. Narcotic Cell through its officer-in-charge, Delhi reported in 1999 Cr. L. J. 3529 and also on Mohanlal Shamji Soni Vs. Union of India reported in 1991 Cr. L.J. 1521.

I have considered the submissions made before me.

It appears from the perusal of the impugned orders and the statement recorded of PW1, complainant Mr. K.K. Toshniwal that the statement was recorded on 03.03.2006. The day on which the statement was recorded, after recording of examination-in-chief, an application was moved to defer the cross-examination to some other date, therefore, it was adjourned and on 18.04.2006 cross-examination from this witness took place. A perusal of the cross-examination reveals that there has been a lengthy cross-examination of this witness. Thus, it appears that in a case relating to a matter

where cheques were dishonoured and the complainant appeared in person and after recoding of the statement in chief on the request of the learned counsel for the petitioner, the matter was adjourned for more than a month and thereafter lengthy cross-examination has been addressed to the witness then it can safely be presumed that proper opportunity to cross-examine the witness has been provided. A perusal of the cross-examination further reveals that almost on all points cross-examination has been addressed and more particularly in relation to the cheques in question. In Rajendra Prasad's case (supra), it has been observed by the Hon'ble Apex Court that the conventional concept is that Court should not permit lacuna in prosecution evidence to be filled up. It has further been observed in this authority that a lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The Court has further observed that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the Court

should be magnanimous in permitting such mistakes.

In Mohanlal Shamji Soni's case (supra), it has been observed that at any stage of enquiry, trial or other proceeding the Court by exercising its discretion may recall or re-examine any person but the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised juidicially with circumspection and consistently with the provisions of the Code.

After carefully perusal of the principle laid down by the Hon'ble Apex Court, it appears that the Court in proper case at any stage of the trial can recall witness already examined but that recalling of the witness should not be as a matter of routine. In proper case, the court can exercise powers vested in it under Section 311 Cr.P.C..

In the instant case, it is apparent that on dishonouring of the cheques, complaints u/s. 138 of the

N.I.Act were filed. Statement of the complainant was recorded as early as in the month of March, 2006 then, on the request of petitioner's counsel the matter was deferred for cross-examination to some other date and that date was of more than 1 ½ months. Thereafter, detailed cross-examination in relation to the cheques in question have been addressed to the witness. Learned trial court in paras No.6 & 7 has considered the matter in detailed and found that in the facts and circumstances of the case it was not considered proper to recall the witness who was already examined. Paras No.6 & 7 of the impugned order read as under :

> 06- " पत्रावली के अवलोकन से प्रकट होता हैं कि प्र.सं. 115/04 में फरियादी ने अपनी जिरह में इस सुझाव को गलत बताया हैं कि प्र.डी.-2 के पृष्ठ पर उसके ए-बी हस्ताक्षर हो तथा इस सुझाव को भी गलत बताया हैं कि प्र.डी.-2 के पृष्ट पर चारमें चैकों का संटलमेन्ट हो तथा यह भी काबिले गौर हैं कि प्र.सं.115/04 में भी फरियादी ने अपनी जिरह में यह जाहिर किया हैं कि यह गलत हैं कि सेटलमेन्ट पेटे उसने 40,000/- रू. प्राप्त किये हो। तथा प्र.डी.-2 पर ए-बी उसके हस्ताक्षर नहीं हैं। इसके पृष्ठ की लिखतम भी उसकी नहीं हैं। ऐसी स्थिति में जबकि दोनों ही प्रकरण में फरियादी ने साक्ष्य में प्र.डी.- 2 पर उसके हस्ताक्षर होने से इन्कार किया हैं एवं यह भी विचारणीय हैं कि अधिवक्ता अभियुक्त द्वारा फरियादी से अपनी जिरह पूरी की जा चुकी हैं।

07- पत्रावली के अवलोकन से यह प्रकट होता हैं कि दिनांक 18.4.2006 को फरियादी की साक्ष्य पूरी होने के पश चात् पत्रावली बयान मुलजिम हेतु नीयत की गई थी एवं बयान मुलजिम हेतु नीयत दि. 6.5.06 को अधिवक्ता अभियुक्त द्वारा कोई प्रार्थना पत्र पेश नहीं किया गया एवं उनके द्वारा दि. 20.5.2006 को यह दोनों ही प्रार्थना पत्र पेश किये गये अब जबकि फरियादी से जिरह हो चुकी हैं एवं पत्रावली बयान मुलजिम हेतु नीयत हो गई हैं तो यह कतई न्यायोचित प्रतीत नहीं होता हैं कि फरियादी को पुन:प्रति परीक्षण हेतु बुलाया जावे। अत: अधिवक्ता अभियुक्त द्वारा प्रस्तुत प्रार्थना पत्र अन्तर्गत धारा 311 दं.प्र.सं. अस्वीकार किये जाने योग्य हैं। धारा 311 दं.प्र.सं. के प्रार्थना पत्र में यह अंकित किया गया हैं कि बचाव पक्ष की स्टेज पर बैंक अधिकारी को मय आवश्यक रेकार्ड के तलब किया जावे इस सम्बंध में मात्र यह लिखना ही उचित प्रतीत होता हैं कि अभी पत्रावली बयान मुलजिम हेतु नीयत हैं एवं बयान मुलजिम होने के पश्चात् ही साक्ष्य सफाई पेश करने की स्टेज आयेगी एवं तभी यह विनिश्चित किया जा सकेगा कि बैंक अधिकारी को मय आवश्यक रेकार्ड के तलब किया जाना उचित हैं अथवा नहीं। इसलिये अधिवक्ता अभियुक्त द्वारा प्रस्तुत प्रार्थना पत्र अन्तर्गत धारा 91 दं.प्र.सं. पर इस स्टेज पर कोई आदेश पारित किया जाना उचित प्रतीत नहीं होता हैं। अधिवक्ता अभियुक्त चाहे तो बयान मुलजिम होने के पश्चात् साक्ष्य सफाई की स्टेज पर अपने प्रार्थना पत्र अन्तर्गत धारा 91 दं.प्र.सं. को प्रेस कर सकते हैं। अत: अधिवक्ता अभियुक्त द्वारा द्वारा प्रस्तुत प्रार्थना पत्र अ.धा. 311 दं.प्र.सं. एतददारा अस्वीकार कर खारिज किया जाता हैं।"

After carefully perusing the reasons given by the learned trial court and perusal of the statement recorded of

the complainant-respondent in this case, there appears no infirmity or illegality in the impugned order which requires interference by this Court under the revisional jurisdiction. The learned trial court has assigned cogent reasons and there was ample opportunity to the petitioner at the time of cross-examination and fact of the matter is that after recording chief-examination of the witness, the matter was adjourned and thereafter on the adjourned date lengthy cross-examination was addressed to the the witness, therefore, in my humble opinion there appears no merit in these revision petitions and they are liable to be dismissed.

In the result, the revision petitions stand dismissed summarily.

(SATYA PRAKASH PATHAK)J.

vij